

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL: SB 98

INTRODUCER: Senators Baker, Negron, and others

SUBJECT: Firearm Regulation

DATE: March 12, 2010

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|------------------|
| 1. | Cellon | Cannon | CJ | Favorable |
| 2. | | | JU | |
| 3. | | | RC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

I. Summary:

Senate Bill 98 creates legislative findings with regard to the manufacture of firearms and the application of the federal Commerce Clause to the manufacture of firearms declared by the Florida Legislature to be outside the purview of federal law. The bill also makes legislative findings as to the application of both the Federal and Florida Constitutions as they relate to the right to bear arms.

The unstated affect of the legislative findings could also reach issues of the sale of firearms.

The ultimate effects of the bill are not likely to be known unless and until the issues it raises are fully litigated.

This bill creates a new section of the Florida Statutes: 790.34.

II. Present Situation:

Briefly stated, the Commerce Clause of the federal Constitution confers an affirmative grant of power to Congress to regulate commerce, which implicitly restricts states or local governments from regulating commerce. This restriction, known as the “dormant” commerce clause, severely limits the extent to which states or local governments can regulate commerce by discriminating against, unduly burdening, taxing, or otherwise interfering with interstate commerce or engaging in economic isolationism. To survive the dormant commerce clause, a state regulation must abstain from pure economic protectionism, regardless of whether the regulation has a discriminatory purpose or is discriminatory in effect.

Recently there has been a movement in the country for legislatures to file legislation identical to, or nearly identical to Senate Bill 98. Tennessee passed the Tennessee Firearms Freedom Act¹ and Montana has passed the Montana Firearms Freedom Act.² Wyoming's governor just signed its Act into law which, along with the New Hampshire version, would subject to criminal prosecution any government official who attempts to enforce federal law relating to firearms manufactured and remaining in those states to criminal prosecution.

The aforementioned laws, like Senate Bill 98, are based on the idea that Congress has no authority to regulate commerce that is strictly intrastate (that is carried on within the borders of one state). This does not appear to be the case under current constitutional case law,³ but the new Montana firearm law is currently being tested in federal court.

III. Effect of Proposed Changes:

Senate Bill 98 creates a new section of statute entitled the Florida Firearms Freedom Act.

It consists of Legislative findings with regard to state rights and federal rights centered around intrastate and interstate commerce in the firearm trade.

There are also Legislative findings that set forth the status of the Florida and Federal constitutional right to keep and bear arms as being matters of contract between the government and the citizenry, and as being "unchanged" since 1845, when Florida was admitted to the union as the 27th state.

Under the heading "Legislative Findings," the bill invokes the Ninth and Tenth amendments to the U.S. Constitution, "as they were understood at the time that Florida was admitted into statehood in 1845." The bill states that the guaranty of the powers granted to the state (not reserved to the federal government) *at that time* constitutes a contract between the government and the citizens of Florida.

The bill addresses intrastate commerce and makes certain findings regarding the manufacture of firearms, firearm accessories, and ammunition.

It further finds that the Second Amendment to the U.S. Constitution – the right to keep and bear arms – "as that right was understood at the time that Florida was admitted to statehood in 1845" is also a matter of contract between the people and the government. The same finding is made with regard to the Florida constitutional provision of the right to keep and bear arms, Section 8, Article I.

Under the heading "Definitions," the bill defines basic materials used to manufacture firearms, firearm accessories, and ammunition. It defines the borders of Florida, firearm accessories, generic and insignificant parts, and the term "manufactured."

¹ House Bill 1796, 106th Leg. (Tenn. 2009), effective June 19, 2009.

² House Bill 246, effective October 1, 2009.

³ *Wickard v. Filburn*, 317 U.S. 111 (1942) holding that the production of wheat for personal use was subject to federal (New Deal) regulation because it competed with commercially- grown wheat. See also *U.S. v. Stewart*, 451 F.3d 1071 (9th Cir. 2006); *Gonzales v. Raich*, 545 U.S. 1 (2005).

The bill declares, under the heading “Legislative Findings,” that firearms, firearm accessories, and ammunition manufactured in Florida and remaining in Florida are not subject to federal law, registration, or regulation under Congressional authority to regulate interstate commerce.

The bill exempts certain generic and insignificant parts, as defined in the bill, from the intrastate commerce umbrella for firearms, accessories, and ammunition created by the bill. It separates the component basic materials and insignificant parts that may go into manufacturing a firearm, accessory or ammunition from the finished product, for purposes of federal regulation. The bill also sets forth the same separation between an accessory that may be imported from another state and the firearm, manufactured in-state, to which the accessory may be attached.

The bill does not apply to the manufacture of certain firearms and ammunition. The descriptions of those firearms and ammunition *not included* within the provisions in the bill appear to match firearms and ammunition regulated by the National Firearms Act of 1934⁴ (which *does not* rely on the Commerce Clause, but rather federal taxing authority, for its power). Therefore, manufacture of the firearms and ammunition in Florida that are not sold outside Florida’s borders covered under the bill, would seem to be limited to those regulated by the Federal Gun Control Act⁵ which does have its foundation in the Commerce Clause.

The section of statute created by the bill becomes effective October 1, 2010, and from that date forward, a firearm manufactured and sold in Florida must be stamped “Made in Florida.”

Other Potential Implications:

It could be argued that the legislative findings in the bill that purport to return Florida’s citizens to the days of 1845, with regard to the way the right to keep and bear arms was “understood” at that time, may encourage citizens to disregard both State and Federal firearm statutes that have been enacted since 1845.

It is well settled that the Legislature properly exercises its police power authority in passing laws that effect the health, safety and welfare of the citizenry. However, it could be argued that these particular provisions of the bill make those laws null and void by virtue of their having changed the 1845 “understanding” of the right to keep and bear arms. If this is so, the Legislature of 2010 could be effectively repealing the laws it has lawfully passed regulating the right to keep and bear arms.

From a public safety perspective, the bill could be argued to have the consequence of exempting made-in-Florida-stay-in-Florida firearms from the federal background checks required by federally licensed firearm dealers in Florida before sales are made. Certainly firearms manufactured in Florida (that do not travel out of state to be sold) stamped “made in Florida” as set forth in the bill, would not bear a serial number as required by federal law therefore would not be easily identified, recorded, or reported sold by licensed dealers or manufacturers. It should be noted, however, that under Florida law a licensed firearm dealer, licensed manufacturer, or

⁴ 26 U.S.C. Chapter 53.

⁵ 18 U.S.C. Chapter 44.

licensed importer is bound to follow the requirements of s. 790.065(12), F.S., or risk being charged with a third degree felony.

Section 790.065, F.S., requires background screening prior to firearm sales and *does not exclude* “made in Florida” firearms. It states, in part, as follows:

790.065 Sale and delivery of firearms.—

(1) A licensed importer, licensed manufacturer, or licensed dealer *may not sell or deliver* from her or his inventory at her or his licensed premises *any* firearm to another person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, *until she or he has*:

(a) Obtained a completed form from the potential buyer or transferee, which form shall have been promulgated by the Department of Law Enforcement and provided by the licensed importer, licensed manufacturer, or licensed dealer, which shall include the name, date of birth, gender, race, and social security number or other identification number of such potential buyer or transferee and has inspected proper identification including an identification containing a photograph of the potential buyer or transferee. ...

(c) Requested, by means of a toll-free telephone call, the Department of Law Enforcement to conduct a check of the information as reported and reflected in the Florida Crime Information Center and National Crime Information Center systems as of the date of the request.

(d) Received a unique approval number for that inquiry from the Department of Law Enforcement, and recorded the date and such number on the consent form.

...

(11) Compliance with the provisions of this chapter shall be a complete defense to any claim or cause of action under the laws of any state for liability for damages arising from the importation or manufacture, or the subsequent sale or transfer to any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year, of any firearm which has been shipped or transported in interstate or foreign commerce. The Department of Law Enforcement, its agents and employees shall not be liable for any claim or cause of action under the laws of any state for liability for damages arising from its actions in lawful compliance with this section.

(12)(a) Any potential buyer or transferee who willfully and knowingly provides false information or false or fraudulent identification commits a felony of the third degree punishable as provided in s. 775.082 or s. 775.083.

(b) *Any licensed importer, licensed manufacturer, or licensed dealer who violates the provisions of subsection (1) commits a felony of the third degree punishable as provided in s. 775.082 or s. 775.083.*

(c) Any employee or agency of a licensed importer, licensed manufacturer, or licensed dealer who violates the provisions of subsection (1) commits a felony of the third degree punishable as provided in s. 775.082 or s. 775.083.

(d) Any person who knowingly acquires a firearm through purchase or transfer intended for the use of a person who is prohibited by state or federal law from possessing or receiving a firearm commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083. ...

Although unstated, the legislative findings in the bill could be argued to exempt firearms manufactured in Florida, that do not leave the state, from the federal excise tax on firearm manufacture, which could set up an entirely different direct conflict with federal law. It does not appear, however, that the provisions in the bill have reached that far in that there are no direct references to Congress's power to tax the manufacture of firearms.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Commerce Clause

Congress is expressly permitted by the U.S. Constitution to regulate interstate commerce, by the Commerce Clause (Article I, Section 8). The powers over commerce not delegated to the federal government by the U.S. Constitution are reserved to the states.

The states retain exclusive control over intrastate commerce - commerce that begins and ends entirely within the borders of a single state. In other words, states may control that commerce which is completely internal, which is carried on between one person and another in a state, and which does not extend to or affect other states.

The power of Congress generally does not extend to the purely internal commerce of the states, and Congress cannot, under the Commerce Clause, enact a regulation which by its

terms applies to intrastate commerce unless the regulated activity exerts a substantial affect on interstate commerce.⁶

In fact, Congress may control commingled interstate and intrastate operations wherever the interstate and intrastate transactions are so related that the regulation of the one involves the control of the other; otherwise Congress would be denied the exercise of its constitutional authority and the states, not the nation, would be supreme within the national field.

Additionally, states may not enact legislation nominally of local concern, that in reality is aimed at interstate commerce or by its necessary operation is a means of gaining a local benefit by burdening those outside the state.⁷ Any state or local regulation that discriminates against out-of-state commerce by providing an advantage to in-state commerce is suspect under the Dormant Commerce Clause of the U.S. Constitution.

A state or local regulation offering economic protectionism or isolation, whether by design or in effect, is ripe for challenge under the Dormant Commerce Clause. For example, the U.S. Supreme Court held in *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988), that Ohio's tax credit for ethanol producers from Ohio, or for states granting a reciprocal tax credit for Ohio-produced ethanol, was constitutionally invalid under the Dormant Commerce Clause as an unlawful burden on interstate commerce.

It could be argued that to the extent that firearm manufacturers in Florida who do not sell their wares outside the state are circumventing taxes, fees, registration requirements, and the established federal regulatory scheme governing the manufacture and sale of firearms that manufacturers and dealers in *other states* abide by, the bill enacts a discriminatory burden on interstate commerce. If this is so, the bill could be ripe for a Dormant Commerce Clause challenge.

Separation of Powers

To the extent that the Legislative Findings set forth in the bill could be viewed as "interpreting" the Constitution, the bill may be said to encroach upon the Court's power to interpret the Constitution and the application of the Constitution to statutory law created by the Legislature and enforced or carried out by the Executive branch.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

⁶ Interstate commerce is generally trade and other business activities between those located in different states, for example traffic in goods and travel of people between states. Black's Law Dictionary (8th ed. 2004), Commerce.

⁷ Adapted from AMJUR COMMERCE § 29, AMJUR COMMERCE § 21

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The language in the bill “remains within the state” and “remains within the borders of Florida” is somewhat imprecise if the sponsor’s intent is that the firearm be *sold or transferred* within the state.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.